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FILED
JAN 8 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 754

IRVING BREITOWICH,

Petitioner,

vs.

MARGARET THARP and STANDARD PROCESS CORPORATION, A Corporation, Garnishee.

Respondent.

BRIEF OF RESPONDENT, MARGARET THARP, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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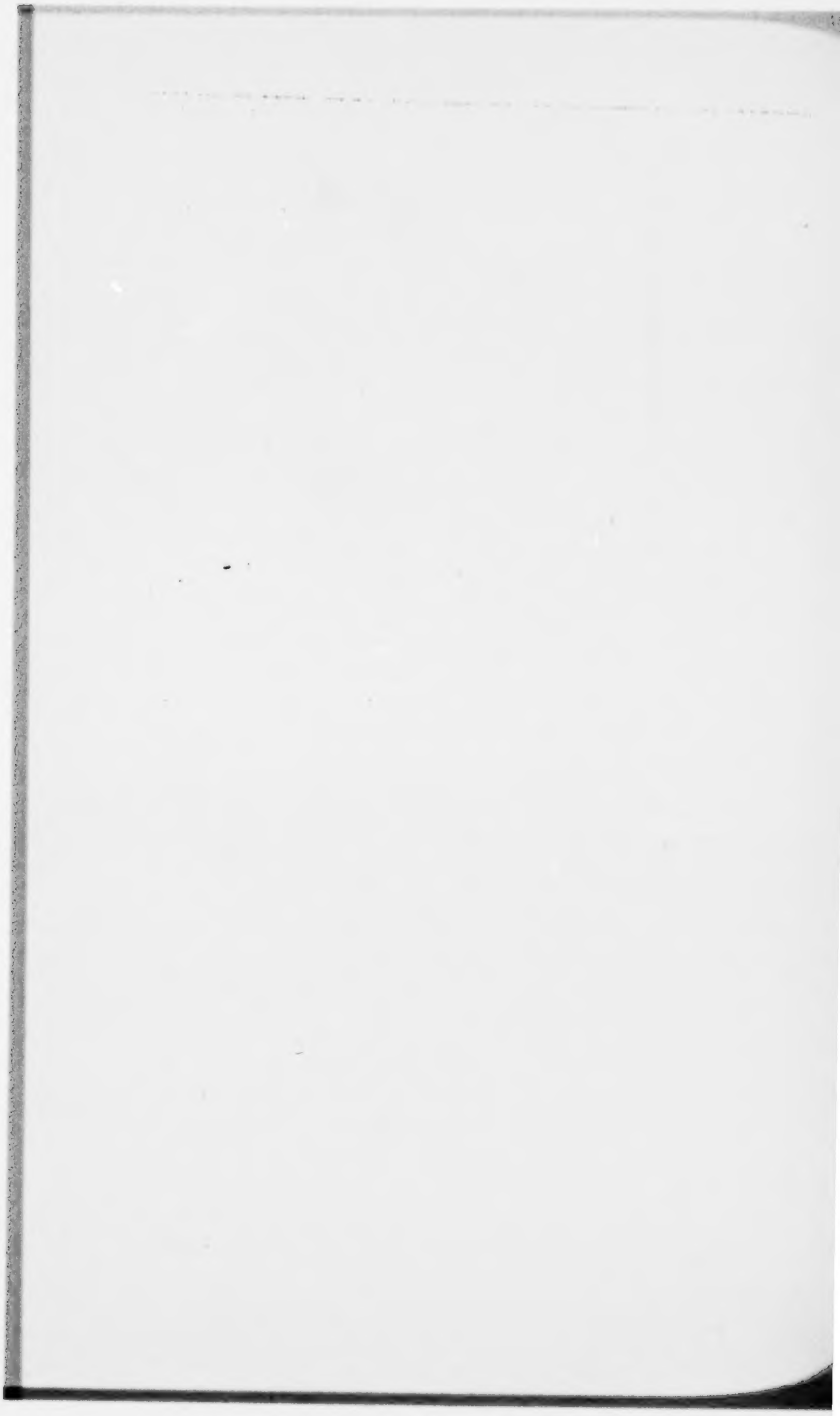

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SUMMARY OF ARGUMENT.

PROPOSITIONS OF LAW AND AUTHORITIES RELIED UPON.

I.

Inasmuch as the Record discloses that no construction of Section 17 of the National Bankruptcy Act is involved and the Record discloses that no federal question has been raised considered or passed upon at any stage of the proceedings prior to the filing of the present petition, or is now involved, this Court is without jurisdiction to review the case on writ of certiorari.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64;
In re Green, 87 Fed. (2d) 951;
Section 17, National Bankruptcy Act.

II.

The complaint herein states a cause of action upon wilful and wanton conduct, based upon a charge of which malice is the gist, falling within the exceptions to debts dischargeable in bankruptcy provided for in Section 17 of the National Bankruptcy Act.

Tinker v. *Colwell*, 193 U. S. 473;
District of Columbia v. *Colts*, 282 U. S. 63;
In re Wegner, 88 Fed. (2d) 899;
In re Greene, 87 Fed. (2d) 951;

Reel v. *Central Ill. Electric & Gas Co.*, 317 Ill. App. 106;
Bartolucci v. *Falleti*, 382 Ill. 174;
Robeson v. *Greyhound Lines, Inc.*, 257 Ill. App. 278;
Greene v. *Noonan*, 372 Ill. 286;
Buck v. *Alex*, 350 Ill. 167;
Jernberg v. *Mix*, 199 Ill. 254;
Buligo v. *Cummings*, 317 Ill. App. 73;
Moore v. *Young*, 317 Ill. 474;
Section 17 National Bankruptcy Act;
Chapter 77, Par. 5, Ill. Rev. Stats. 1943.

ARGUMENT.

I.

Inasmuch as the Record discloses that no construction of Section 17 of the National Bankruptcy Act is involved and the Record discloses that no federal question has been raised considered or passed upon at any stage of the proceedings prior to the filing of the present petition, or is now involved, this Court is without jurisdiction to review the case on writ of certiorari.

The Petition for Certorari filed herein should be denied because the record shows that contrary to the contention of the Petitioner, this cause does not involve the construction of Section 17 of the National Bankruptcy Act, but as the Appellate Court says,

> "the only question for decision is whether the judgment * * * was 'for wilful, wanton, and malicious injury to the person' within the meaning of Section 17 of the National Bankruptcy Act, and * * * that this must be determined by whether the complaint in the personal injury case 'set up a wilful and wanton count'."

Section 17 of the National Bankruptcy Act provides:

> "A discharge in bankruptcy shall release a bankrupt from all his provable debts, whether allowable in full or in part, except such as * * * for wilful and malicious injuries to the person or property of another, * * * etc."

There is nothing ambiguous about the phrase "wilful and malicious injuries to the person or property of an-

other'' which requires construction. This phrase was construed in the case of *In re Greene,* 87 Fed. (2d) 951, cited by the Appellate Court, where it is said:

> ''Applying to the term 'wilful and wanton,'' the meaning given by our courts and the meaning of the words themselves constituting such term, it seems that an act done willfully and wantonly is included in the bankruptcy statute and any judgment obtained because of such act is not dischargeable by bankruptcy. Such an act must be said to have been done willfully and maliciously, as contemplated by the Statute.''

There is and can be no distinction between the words ''wilful and malicious'' employed in the Bankruptcy Act and those of ''wilful, wanton, and malicious'' employed in the complaint. All the task required of the Appellate Court was to construe the complaint, and this they did at length, and arriving at the correct result, and which result was concurred in by the Supreme Court of Illinois in denying the Petition for Leave to Appeal from there.

The question of whether or not the complaint in this cause states a cause of action, of which malice is the gist, and for wilful and wanton conduct or for wilful and malicious injuries to the person must of course, be decided upon the law of the State of Illinois and not upon the decisions of Federal Courts, which considers the tort law of other states by which the Federal Court is bound, or by the laws and decisions of the courts of other states. ***Erie Railroad Co.*** **v.** ***Tompkins,*** **304 U. S. 64.**

The only question involved in this cause is what constitutes proper allegations in a complaint, under Illinois Law, to charge the commission of wilful and wanton or wilful and malicious injuries by a person to another, and nothing more.

In *Lesser* v. *Gray*, 236 U. S. 70, the federal question there arose out of the fact that the debt sued on in the State Court, and scheduled and attempted to be proved up in the Bankruptcy Court, was disallowed in that court, and the theory of the suit in the State Court was that the obligation was a non-provable debt. The court held that if a provable debt, it was discharged by the bankruptcy, and if not, it had been disallowed by the Bankruptcy Court, and the plaintiff could not prevail in either event. The question of whether or not the debt fell within the exceptions provided in Section 17 of the National Bankruptcy Act did not arise.

In *Local Loan* v. *Hunt*, 292 U. S. 234, the appeal here was from litigation which arose from the bankruptcy court where ancillary jurisdiction was invoked in equity, to enforce the discharge in bankruptcy and enjoin a proceeding in the State Court.

In *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328, the court here examined the evidence, where a discharge in bankruptcy had been pleaded to an action of trover for conversion of an automobile, to ascertain whether or not the same disclosed a wilful and malicious injury to the property of another within the exceptions of the Bankruptcy Act.

In the case at bar, this court is bound to follow the Illinois law and decisions, since the question of whether or not the complaint in this case states a cause of action, of which malice is the gist, and for wilful and malicious injuries within the provisions of the exceptions provided for in Section 17 of the National Bankruptcy Act, depends on Illinois Law. It must be presumed that the evidence introduced on the trial before court and jury sustained the charges and allegations contained in the complaint.

II.

The complaint herein states a cause of action upon wilful and wanton conduct, based upon a charge of which malice is the gist, falling within the exceptions to debts dischargeable in bankruptcy provided for in Section 17 of the National Bankruptcy Act.

The Petitioner in the courts below urged upon both the trial Court, the Appellate Court, and the Supreme Court that the case of *Reel* v. *Central Ill. Electric & Gas Co.*, 317 Ill. App. 106, is good and sound law, but that nevertheless, the complaint in the instant cause fails to state a cause of action adequately charging wanton and wilful conduct. The complaint appears at pages 1-3 of the Transcript of the Record herein.

It charges in substance that while the plaintiff was crossing from the southwest corner of LaSalle Street to the northwest corner thereof at its intersection with Chicago Avenue, the traffic lights then and there having "the signal displayed for traffic proceeding northerly on LaSalle Street was 'green' and the signal displayed for traffic proceeding in an easterly direction on Chicago Avenue was 'red,' and which was the direction in which the defendant was proceeding in his automobile," plaintiff "proceeded across Chicago Avenue after the 'green' light flashed for traffic proceeding north and south on LaSalle Street, the defendant "entered upon said intersection by proceeding in an easterly direction on Chicago Avenue, and attempted to drive across LaSalle Street after the signal for traffic proceeding in an easterly and westerly direction was 'red.'" The complaint further charges that in violation of his duty, and of his failure to exercise "a proper and sufficient lookout so as to have discovered the presence of the plaintiff

in the proper act of crossing said street as aforesaid" and of his having "failed to keep his motor vehicle under sufficient and proper control so that it could be readily brought to a stop or slackened in speed" and in violation of his duty "not to wantonly or maliciously or wilfully injure the plaintiff, a pedestrian" yet the defendant in disregard of his said duty wantonly, wilfully and without regard for the safety of the plaintiff, the defendant ran his said automobile "without heeding certain traffic signal then and there set against" him and as a result thereof "struck" and ran upon the plaintiff and by reason of said negligence and carelessness she was knocked violently to the ground" and all as a direct result of the improper acts of the defendant" etc.

We are not here concerned with the measure of *proof* required for wilfull and wanton misconduct, but only with the measure of *charge* thereof in the complaint. We concede that the mere disregard of a traffic ordinance standing alone is not a sufficient charge of wilfull and wanton misconduct. But in the instant case much more than that is charged, as the entire factual situation set up in the complaint discloses. The plaintiff was crossing the street intersection with the traffic lights in her favor, she did not enter the same until after the traffic lights had changed in her favor, the traffic lights were set against the defendant, he entered the intersection after the same had changed against him, he failed to maintain a lookout for the plaintiff who was in plain view before him, he failed to stop his car, he failed to reduce his speed, he failed to operate his said car so that he was able to do either or both, and in wilfull and wanton and malicious disregard of the safety of the plaintiff and in disregard of his obligation not to injure her, he ran her down with his car and injured her.

What constitutes wilfull and wanton misconduct, aside from proof, but as a charge, has been passed upon by the Supreme Court of Illinois in *Bartolucci* v. *Falleti*, 382 Ill. 174, where at page 174 it is said:

> "Ill will is not a necessary element of a wanton act. To constitute an act wanton, the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences makes a case of constructive or legal wilfulness. *Streetr* v. *Humrichouse*, 357 Ill. 234; *Jeneary* v. *Chicago etc. Traction Co.*, 306 Ill. 392."

We respectfully submit that a casual reading of the complaint herein (Abst. 1-3) will readily disclose a complete compliance with every detail as set down by the Supreme Court of Illinois as necessary allegations to an adequate charge of wanton and wilful misconduct, in that it sets up specifically all the details of the factual situation, all the attendant circumstances, and the interrelation between the factual situation and the acts of the defendant with the resultant injury directly to the plaintiff, of whose rights and situation the defendant was then and there acutely conscious. She was a pedestrian and not a guest in the automobile of the defendant. To repeat, we are not concerned with the nature of the evidence necessary to support the charge, but simply with the sufficiency of the allegations to charge the same. Respondent certainly does charge the reckless disregard of a known duty, and that the act done was the heedless act of the defendant done in violation of the plaintiff's rights and not a mere omission of duty.

Respondent adopts what Judge Dove says on page 109 of *Reel* v. *Central Ill. Electric & Gas Co.*, 317 Ill. App. 106, and the following pages. He effectually distinguishes the case of *Harris* v. *Piggly Wiggly Stores*, 236 Ill. App. 392, so much relied on by the petitioner, from the instant situation, where it is directly charged that the wilfulness and wantonness is connected directly not only to the driving of the car, but directly to the striking and injury of the respondent.

The petitioner leans heavily on *In re Wegner*, 88 Fed. (2d) 899, and a line of federal cases cited therein to sustain the petition herein. This case, however, is readily distinguishable from the one at bar. At the conclusion of the trial in that case, in the Superior Court of Cook County, the court withdrew from the consideration of the jury counts 2 and 4 of the complaint which charged wilful and malicious conduct with an intent to injure the appellant-plaintiff. This left only the counts of general negligence and one charging the operation of defendant's automobile on a public highway in "a wanton and reckless manner and with an utter disregard of the safety of others • • • and under circumstances likely to cause great bodily injury to her." The Seventh United States Circuit Court of Appeals, on an appeal by the plaintiff from a discharge in bankruptcy in the District Court of the defendant, from a judgment in the cause in the Superior Court, held, obviously, that this remaining language was not enough to bring the judgment on a general verdict in the cause within the exception of Section 17 of the National Bankruptcy Act, for the complaint, with the counts in question withdrawn, failed to charge "willful and malicious injuries to the person." The Circuit Court of Appeals said that if the withdrawn counts had been submitted to the jury "and a finding of guilty had been returned thereon, there can be

no doubt but that a judgment rendered thereon would have come within the exception contained in the Bankruptcy Act, *supra*, and would not have been dischargeable in bankruptcy."

The Superior Court obviously did not consider the evidence in the cause sufficient to support and validate the charges of willful and wanton and malicious conduct charged in the complaint, and therefore withdrew these counts. The charge was sufficient but the evidence was insufficient to sustain the charge. In the case at bar, the court is not concerned with the evidence, for it is not before the court, and the charge is sufficiently made in the complaint. It must be presumed that the evidence was sufficient to support it, for the Superior Court submitted the issues thereon to the jury who returned their verdict of "guilty" thereon. Petitioner has not brought the evidence taken in the original cause in the trial Court before this or any other intermediate Court, and his inference from what he presumed the evidence to be, for example, as stated on page 24 of his Brief, "that she was not seen by defendant for some reason," is not justifiable.

The United States Supreme Court in *Tinker* v. *Colwell*, 193 U. S. 473, 42 S. Ct. 505, 510, 48 L. Ed. 754, defines what constitutes "Willful, wanton and malicious" conduct within the provisions of the exception of the Bankruptcy Act as follows:

> "A willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily caused injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception."

This rule is similar to that announced by the Supreme Court of Illinois in *Bartolucci* v. *Falletti*, 382 Ill. 174.

As to the sufficiency of the charge in the complaint in the case at bar, in *Robeson* v. *Greyhound Lines Inc.*, 257 Ill. App. 278, the court held that averments in a declaration for damages sustained by a person in an automobile from a collision with a motor bus, that the motor bus was driven in a closely built-up section of a populous city at a speed in excess of the statutory rate; that the plantiff was in full view of the motor bus operator and had the right of way over the street intersection; and that the operator of the motor bus wilfully and wantonly ran the same into plaintiff's automobile, were sufficient to charge the acts of the motor bus operator to have been wilful and wanton. Mr. Justice Eldredge, speaking for the court, said (p. 280):

> "It is claimed that the facts alleged in this count do not show any wilful and wanton misconduct on the part of the servant of the defendant in driving said motorbus in a closely built-up section of a populous city for the reason that a violation of the statute in regard to the speed of motor vehicles in cities is not evidence of wilfulness and wantonness. If that was the only allegation as to the conduct of the servants of defendant in the driving of the motorbus the objection would have been well taken but the count also charges that the plaintiff was in full view of the operator of the motorbus and had the right of way over the intersection and also the operator of the motorbus wilfully and wantonly ran the same into her automobile causing the injuries complained of. The averments are sufficient to charge the acts of the operator of the motor bus to have been wilful and wanton."

The United States Supreme Court in *District of Columbia* v. *Colts*, 282 U. S. 63, 75 L. Ed. 177, 51 Sup. Ct. 52, characterized the charge of driving an automobile at a rate of speed in excess of the limit provided by law "so as to endanger property and individuals" as follows:

"The offense here charged is not merely *malum prohibitum*, but in its very nature is *malum in se*. It was an indictable offense at common law. * * * when horses, instead of gasoline, constituted the motive power. * * * An automobile is, potentially, a dangerous instrumentality, as the appalling number of fatalities brought about every day by its operation bear distressing witness. To drive such an instrumentality through the public streets of a city so recklessly 'as to endanger property and individuals' is an act of such obvious depravity that to characterize it as a petty offense is to shock the general moral sense. * * * Such an act properly cannot be described otherwise than as a grave offense—a crime within the meaning of the Third Article of the Constitution."

The Supreme Court of Illinois has repeatedly passed upon the question of what constitutes "willful, wanton and malicious" conduct such as falls within the purview of the exception in the National Bankruptcy Act, as we have demonstrated herein, and its decisions are in harmony, as is that of the Appellate Court in the case at bar, with those of the Federal Courts, other Appellate Courts and the Supreme Court of Illinois. Petitioner cavils because the Appellate Court refused to accept his construction of the complaint in the case at bar, rather than its own, as being in conformity with the settled law of this state.

In a labored attempt to distinguish the case of *In re Greene*, 87 Fed. (2d) 951, from the proposition before the Court in the case at bar, petitioner would make much of a special interrogatory submitted to the jury, and answered to the effect that the defendant was guilty of wilful and wanton conduct as charged in the third count of the complaint. The special interrogatory added nothing to the verdict in so far as determining whether or not the injuries sustained were "wilful, wanton and malicious" in so far

as the effect of the charge made in the complaint characterized them as such. It was a determination that the evidence substantiated the charge in the complaint.

In the case at bar, no special interrogatory was submitted to the jury, and the verdict and judgment in the original action were general in nature. Under such a state of facts, prior to 1935, the Clerk of the Court in which the original judgment was entered would have the right to issue a body execution and thus to cause the defendant to be incarcerated and deprived of his liberty. Under the amendment to the Statute of Illinois in regard to judgments and decrees, which amendment was adopted in 1935, no execution can issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, and it shall appear from a special finding of the jury, or from a special finding of the Court without a jury, that malice is the gist of the action, and except when the defendant shall refuse to deliver up his estate for the benefit of his creditors. Chapter 77, par. 5, Ill. Rev. Stats. 1941 (Bar Ass'n. Ed.).

The effect of this statutory amendment goes merely to the remedy and not to the essential character of the judgment itself. The Clerk of the Court, being merely a ministerial officer of the court and not necessarily trained and learned in the field of substantive law, should not be required to refer to the pleadings in a former action and to arrive at the legal concusion as to whether or not a former judgment was one under which a body execution could issue. Such a determination or decision is of necessity judicial in character, and the obvious reasoning behind the statutory amendment in question was only to define sharply the circumstances and conditions under which a ministerial officer could deprive a defendant of his liberty.

Such a situation can be distinguished readily from the application of the National Bankruptcy Act, Sec. 17, in a subsequent judicial proceeding, to determine whether or not the cause of action in a former suit was predicated upon willful and malicious injuries to the person of another.

This provision as to nondischargeable debts is grouped into several classifications. The second classfication of nondischargeable debts is quite diversified in nature and includes liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, etc. Several types or classes of nondischargeable debts are not those for which a body execution can issue in the State of Illinois, and to state that because a body execution might not issue in the instant situation is the same situation as debts not discharged by the National Bankruptcy Act, would be to confuse hopelessly two entirely separate and distinct legal propositions.

The case of *Greene* v. *Noonan*, 372 Ill. 286, is a case which was heard subsequent to the 1935 amendment to the Judgments Act, in which the Supreme Court said:

> "Where the declaration consists of several counts, one or more of which state a cause of action, the gist of which is malice, with others, based upon negligence only, and the verdict is general, without specifying the count on which it is based, the presumption is that the verdict is based upon a cause of action of which malice is the gist."

Citing *Buck* v. *Alex*, 350 Ill. 167; *Jernberg* v. *Mix*, 199 Ill. 254.

See also *Buglio* v. *Cummings*, 317 Ill. App. 73.

The Court goes on to say that the amendment of 1935 to the Judgments Act has nothing to do with a presumption as to how the jury arrived at its verdict, and has nothing to do with procedural matters, but affects only the remedy. In this connection the only remedy referred to in the Judgments Act, and the only remedy limited by the section in question, is the right to have a body execution issued, and does not touch by inference the National Bankruptcy Act.

In *Reel* v. *Central Ill. Electric & Gas Co.*, 317 Ill. App. 106, the Appellate Court for the Second District, in a well-reasoned opinion by Mr. Justice Dove, on a state of facts identical with those presented by the case at bar, held that the term "wilful and wanton," in a complaint in an action for personal injuries sustained when plaintiff was struck by defendant's automobile, general judgment in which action, complaint in which also contained mere negligence counts, was rendered on general verdict for plaintiff, had the same meaning as the term "wilful and malicious," employed in Section 17 of the National Bankruptcy Act, and hence the defendant was not released, by his subsequent discharge in bankruptcy, from civil liability under judgment. (11 U. S. C. A. Par. 35.) The Court accordingly reversed the trial Court who held the contrary thereof, as in the case at bar.

We adopt all that Judge Dove says in the opinion as determinative of the issues pending here on this petition, as our own. It has been followed in *Moore* v. *Young*, 317 Ill. App. 474.

In the light of these decisions, and that of the Supreme Court of Illinois in *Greene* v. *Noonan*, 372, Ill. 286, the present situation comes within the rule announced and cited therein, and is not in any manner disturbed by the bankruptcy proceedings.

CONCLUSION.

As was said by the United States Supreme Court in *Tinker* v. *Colwell*, 193 U. S. 473, 24 S. Ct. 505, 510, 48 L. Ed. 754:

> "It is an honest debtor and not a malicious wrongdoer that is to be discharged."

The complaint herein in addition to charging general negligence adequately charges Irving Breitowich, also known as Irwin Breit, with "willful, wanton and malicious" misconduct, and the jury returned a general verdict of guilty on all charges. Since the evidence is not of concern here, but is presumed to have been adequate to support said charge, we, therefore, submit that the debt upon which the present garnishment proceedings are based, was not discharged in bankruptcy as decided by the Appellate Court, and in view of the foregoing, respondent prays that the petition for review by writ of certiorari should be denied.

All of which is respectfully submitted,

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Margaret Tharp.